BRIEF

In Support of Foregoing Petition for Certiorari to United States Circuit Court of Appeals, Eighth Circuit.

I.

The terms "employer" and "employee," as used in the National Labor Relations Act, should be construed in their usual and long-established sense.

The Board found that the petitioners had violated section 8 (5) of the act by refusing to bargain collectively with the union as representative of the miners and haulers, found by the Board to be employees. The only definitions contained in the act of the terms "employer" and "employee" are found in sections 2 (2) and (3),[1] but these definitions give no indication that Congress intended that the Board should have jurisdiction over any controversy under section 8 (5) not having the common-law employer-employee relationship as its foundation. Section 2 (3) does provide that "the term 'employee' * * * shall not be limited to the employees of a particular employer * * *," but Senate Committee Report No. 573 (May 2, 1935) makes it clear that this provision has no application to the instant case. Also see **Columbia River Co. v. Hinton, 315 U. S. 143, 146, 62 S. Ct. 520, 86 L. ed. 750,** in which this Court, in interpreting Section 13 of the Norris-LaGuardia Act (47 Stat. 73), said (l. c. 146):

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of

1 Set forth in Appendix A, infra, p. 25.

the Act to include controversies upon which the employer-employee relationship has no bearing."

Since Congress expressed no intention that the terms "employer" and "employee' used in the act should be interpreted (except in circumstances not here present) at variance with the commonly accepted understanding of those terms at common law, i. e., implying the right of control over the manner in which work is performed **(Singer Manufacturing Company v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 444)**, it will be presumed that Congress knew their established meaning and so used them.

United States v. Stewart, 311 U. S. 60, 61 S. Ct. 102, 85 L. ed. 40;
Old Colony R. Co. v. Commissioner, 284 U. S. 552, 52 S. Ct. 211, 76 L. ed. 484.

This Court has applied the test used in the **Singer case**, supra, in determining the meaning of the term "employee" used in the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A., Sec. 51 et seq., and has held that the term does not include "independent contractors."

Hull v. Philadelphia & Reading R. Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. ed. 670;
Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449, 36 S. Ct. 403, 60 L. ed. 735;
Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84, 35 S. Ct. 491, 59 L. ed. 849.

The Circuit Court of Appeals for the Tenth Circuit has held under Title VIII, Section 801 et seq., of the Federal Social Security Act, 42 U. S. C. A., Sec. 1001 et seq., that the usual tests are used in determining whether the employer-employee relationship exists. **Jones v. Goodson, 121 F. (2d) 176, 179.** The Circuit Court of Appeals for the Fifth Circuit has ruled similarly under the **Fair Labor**

Standards Act, 29 U. S. C. A., Sec. 201 et seq. Bowman v. Pace, 119 F. (2d) 858.

Under the foregoing cases and established common-law rules, the miners and haulers are not employees of the petitioners. The Board has stipulated that the miners furnish their own tools and the haulers their own trucks, and that both have full freedom of action in determining when and how they perform their work (R. 413-14). The record is barren of any evidence that the work of either is supervised in any respect. Under the Missouri Mining Statutes[2] the miners' right to mine runs for a term of three years, provided they comply with the statutory conditions. The record shows, and the Board has not found to the contrary, that miners are free to mine on property not owned by the petitioners and engage in other enterprises (R. 76-7, 86, 266-67, 271, 283, 297, 309, 326). The miners are not even required to deliver their tiff to the petitioners, since, as stipulated by the Board, all tiff mined on the petitioners' property is sold either to R. A. Blount individually or to third parties (R. 412). However, even if the petitioners required the miners to deliver their tiff to them, or if, as found by the Board, petitioner R. A. Blount arranged for the disposition of the tiff, this would merely be an exercise of control over the results of the work rather than over the manner in which the work is performed. **Woodruff v. Superior Mineral Company, 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed 337 Mo. 718, 85 S. W. (2d) 743.** We, therefore, submit that the miners and haulers are not employees of the petitioners within the meaning of the act.

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2 Set forth in Appendix B, infra, pp. 26-30.

II.

The decision of the court below ignores the fact that the right of control over the manner in which work is performed is an inherent element in collective bargaining.

The present controversy is essentially one between producers of ore (who are free of any right of control in the petitioners as to the manner in which they carry out their enterprise and who have a contractual license under the Missouri mining statutes to mine for a term of three years, said license being subject to termination "only by consent or by condition broken" **[Bingo Mining Co. v. Felton, 78 Mo. App. 210, 214-15]**), and the owners of the land on which the miners conduct their independent enterprises. The petitioners are not engaged in the business of mining and milling tiff, and only one of them, petitioner R. A. Blount, purchases individually, and not as agent for the other petitioners (Stipulation, R. 411), any of the tiff mined on their property.

The court below, therefore, should have held that the National Labor Relations Act has no application in the instant situation, which is not a dispute over "rates of pay, wages, hours of employment, or other conditions of employment" [the terminology used in section 9 (a) of the act], since the elements implicit in those terms are not here present. The terms used in section 9 (a) clearly indicate that an "employer" subject to section 8 (5) must have the right of control over the manner in which work is performed by the persons who are asserted to be his "employees."

If any "dispute" exists in the instant situation, it is one between petitioner R. A. Blount individually and the

miners over the sale of their products. Such a dispute, we submit, is not within the purview of the act.

Columbia River Co. v. Hinton, 315 U. S. 143, 62 S. Ct. 520, 86 L. ed. 750.

In that case, decided under the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. A., Sec. 101 et seq.), this Court said (l. c. 145):

> "We think that the court below was in error in holding this controversy a 'labor dispute' within the meaning of the Norris-La Guardia Act. That a dispute among business men over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment' calls for no extended discussion. This definition and the stated public policy of the act—aid to 'the individual unorganized worker * * * commonly helpless * * * to obtain acceptable terms and conditions of employment' and protection of the worker 'from the interference, restraint or coercion of employers of labor'—make it clear that the intention of Congress was focused upon disputes affecting the employer-employee relationship and that the Act was not intended to have application to disputes over the sale of commodities."

Since the purpose of the act is substantially the same as Norris-La Guardia Act, i. e., the protection of employees in their right to act collectively in obtaining better terms and conditions of employment, the court below should have held that the act is not applicable in the instant situation.

III.

The decision of the court below misinterprets the decisions of the Missouri courts in Woodruff v. Superior Mineral Co., 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743, and fails to hold that under the Missouri Mining Act the miners are independent contractors and that such status under the law of the State of Missouri is controlling on the Board.

The court below stated that "There was no division in the Missouri courts deciding that a tiff miner was an employee of the lessee of the ore lands within the intendment of the Compensation Act (**Woodruff** decisions, supra), but if the action had been at common law for damages resulting from failure of a master to perform some duty owed to a servant, doubtless other considerations would have been deemed relevant" (R. 552-53). It is thus implied that, in applying the Workmen's Compensation Act of Missouri, the Commission and the Missouri courts departed from common-law standards in determining whether the claimant was an employee covered by that act. In arriving at this conclusion the court below overlooked the facts (1) that Section 3308 (a), Revised Statutes of Missouri 1929 [Section 3698 (a), R. S. Mo. 1939], selects and specifies, in addition to employees, a limited class of persons, **independent contractors** and their subcontractors, as being entitled to benefits under the act **if injured on the premises of the employer in the course of the employer's usual business there carried on,** and (2) that, apart from the limited class of independent contractors referred to, common-law standards are used in determining whether a claimant is an employee covered by the Compensation Act.

Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S. W. (2d) 909, 912;

Coul v. Peck Dry Goods Co., 326 Mo. 870, 32 S. W. (2d) 758.

The court below also overlooked the fact that in the **Woodruff** case the Missouri courts specifically held that the claimant tiff miner was an independent contractor falling within the limited class specifically covered by section 3308 (a). The facts concerning the relationship in the **Woodruff** case and those in the instant case are similar, except that the miner in the **Woodruff** case sold all of his ore to the mining company engaged in milling it on the premises under lease to it and where he conducted his mining operations. The St. Louis Court of Appeals (230 Mo. App. 616) reviewed the facts concerning the relationship in the **Woodruff** case as follows (l. c. 621):

> "The record discloses that in the summer of 1930 Woodruff left the City of St. Louis and moved to Washington County where he joined his cousin Jim Greenlee, who was mining tiff upon the land under lease to the defendant company. Woodruff assisted Greenlee in his work, and the tiff which they mined was delivered to the defendant company; the money received therefor being divided between them. In the fall of 1930 Woodruff moved into a small house belonging to the defendant, where he was permitted to live without paying rent, and with the permission and consent of the defendant he entered upon the leased land and dug tiff and other minerals thereon until the day of his injury in January, 1932. The tiff which Woodruff mined was hauled to the mill of the defendant, who retained the royalty and deducted the cost of the hauling and paid over the balance remaining to the claimant miner. It is conceded that no orders were given to Woodruff as to where or how or how much tiff he should mine, or when to start or when to quit, and that Woodruff worked as long or as little as he chose, and that he himself furnished the necessary tools and equipment needed for the work."

The Court further stated (l. c. 621) that:

> "Upon the record before us it is apparent that the defendant failed to post a printed statement of the terms, etc., as required by section 13593, and, therefore, plaintiff's rights to mine upon the property leased by defendants became fixed under the terms of section 13594, that is, the rights of plaintiff and defendant company are to be viewed as though there had been a written contract or agreement between the parties conforming to the terms of said section. Plaintiff therefore had a license to continue with his mining for a period of three years subject to defendant's 'lien on all minerals taken or dug therefrom for the royalty due thereon until the same is paid' * * *."

In holding that claimant was entitled to compensation as an independent contractor under section 3308 (a), the Court said (l. c. 622):

> "Our mining statutes therefore furnish the basis of a contract between the defendant mineral company and the claimant herein under which plaintiff, as licensee, mined tiff upon the defendant's property. The mining of the ore under the facts in the case seems to us to be a service rendered by the miner to the defendant mining company; the mining of the ore being work done according to the miner's own methods and without being subjected to the control of the mining company excepting as to the result of his work. The miner, therefore, was exercising an independent employment under statutory regulations, exercising his skill and judgment as a miner in the prosecution of his work, the execution of which was left entirely to his discretion, without any restriction as to its exercise or limitation, either as to the manner in which or as to the time in which the work had to be done. We find, therefore, abundant substantial testimony to support the findings of fact of the Workmen's Compensation Commission that the claimant rendered his services to the defendant in the course of an independent

occupation representing the will of the mining company only as to the result of his work and not as to the manner in which it was accomplished, and that the claimant in the instant case was an independent contractor."

The Supreme Court of Missouri (337 Mo. 718) quashed its writ of certiorari issued in the **Woodruff** case, saying (l. c. 725):

"We fail to see how there is any conflict between this court's definition of an independent contractor and the ruling in the opinion of the Court of Appeals that a miner digging mineral, under the circumstances and arrangements stated therein, on the property of a mining company is as toward it an independent contractor, contracting to dig and deliver its mineral to its mill at the price paid to others therefor. It would seem that Woodruff did exercise an independent employment (independent of control or right to control the time, means, or agencies thereof); that he did contract to do the work according to his own methods (without supervision or direction and with his own equipment); and that he was not subject to the control of the mining company except as to the result of his work (the result contemplated being that he would deliver to the company mill all of the tiff he could dig in three years working at least two-thirds of each month). He was to be paid in accordance with the result of his work, namely, for the amount of tiff which he brought to the mill, at the price paid to others for the same mineral, except that he was required to deliver a certain amount without charge, as royalty, which no doubt in this case the mining company, as lessee, was obligated to deliver to the owner of the leased land. It seems that there is authority in other jurisdictions for holding that somewhat similar arrangements do create the relation of independent contractor between the miner and the mining company (citation of authority). This court certainly has never held otherwise."

We, therefore, submit that under their statutory contract with the petitioners, as interpreted by the Missouri courts, the miners are not employees. At most, they are independent contractors if the Board's finding that petitioner, R. A. Blount, controls the disposition of the tiff is supported by the evidence. The haulers are also not employees under the law of the State of Missouri, since they own their own trucks and the petitioners have no control over how and when they do their hauling. **Rutherford v. Tobin Quarries, 336 Mo. 1171, 82 S. W. (2d) 918.** The court below, therefore, erred in not holding that the status of the miners and haulers as independent contractors under their contracts and the law of the State of Missouri is controlling on the Board.

Tyler v. United States, 281 U. S. 497, 501, 50 S. Ct. 358, 74 L. ed. 991;
Metropolitan Life Ins. Co. v. United States, 6 Cir., 107 F. (2d) 311, certiorari denied 310 U. S. 630, 60 S. Ct. 978, 84 L. ed. 1400;
Dayton & Mich. R. Co. v. Commissioner, 4 Cir., 112 F. (2d) 627, 630.

IV.

The decision of the court below fails to take into account the fact that the Board's order (1) places the petitioners in the position of being required to violate their contracts with the miners under the Missouri Mining Act, and (2) denies the liberty of contracting to assume relationships which do not contain the elements of control inherent in the employer-employee relationship—all of which is in violation of the Fifth Amendment to the Constitution of the United States.

The Board's order boils down to requiring the petitioners to change, or attempt to change, the independent status of the miners, all of whom, under the Missouri stat-

utes and long-established principles of federal and state law, are independent contractors or producers, into that of employees. That the Union contemplates a fundamental change in the status of the miners is evidenced by the testimony of the union president to the effect that he requested petitioner R. A. Blount to bargain with respect to "seniority rights," "rates of pay," and a "check-off system" (R. 19). The union, therefore, does not desire to bargain respecting the selling price of tiff, but its purpose is to require the petitioners to engage the miners as employees under a contract prescribing "rates of pay" and, a fortiori, definite hours of employment. This means that the petitioners would have to cease being mere landowners and be required to go into the business of mining tiff, with the necessity of installing a system of supervision and control over the manner in which the miners perform their work.

The unconstitutional effect of the Board's order is twofold: **First,** it enables persons who have contracted to assume an independent relationship to resort to the processes of the Board to compel the person with whom they contract to abrogate the existing contract and negotiate a new one creating a fundamentally different relationship; **secondly,** the petitioners are placed in a position of being required to violate their contract with the miners created under the Missouri Mining Act. Neither the Board nor the Circuit Court of Appeals held that the miners were not subject to the Missouri Mining Act, Sections 13593 to 97, R. S. Mo. 1929, Sections 14783 to 87, R. S. Mo. 1939; yet both required the petitioners to treat the miners as employees and comply with the terms of the National Labor Relations Act. The order of the Board would require the petitioners to negotiate with the miners concerning wages, hours and conditions of employment. The Missouri Mining Act, supra, requires the petitioners to treat the miners as

independent contractors and forbids the petitioners to interfere with the free exercise of their rights under the Mining Act, including the miners' right to work where they please, when they please, how they please and how much they please. If a miner is an employee, as the Board holds, then the petitioners certainly would have the right to discharge him. Yet if the petitioners undertook to do so, they would be liable to the miner under the Missouri Mining Act. There is, therefore, an irreconcilable conflict between the order of the Board and the Missouri Mining Act unless the National Labor Relations Act nullifies the Missouri Mining Act. The petitioners might attempt to "discharge" a recalcitrant miner who resists supervision or control, or who refuses to join the union pursuant to a closed-shop contract, or who refuses to pay his union dues, or who is told that he can no longer mine because his seniority is not as great as that of another miner, but the miner could resist the discharge or eviction in the Missouri courts.

The foregoing illustrates a fact which should have been clear to the Board, that "collective bargaining" is an impossibility with miners who are subject to the provisions of the Missouri Mining Act (as was admittedly the case of all miners in the instant case). The Board's order is arbitrary and a denial of the obligation and freedom of contract, and, therefore, in violation of the Fifth Amendment to the Constitution of the United States. Since there is serious doubt, to say the least, as to the constitutionality of the act as applied by the Board in this case, the court below should have denied enforcement of the Board's order.

Wright v. Mountain Trust Bank, 300 U. S. 400, 57 S. Ct. 566, 81 L. ed. 736.

CONCLUSION.

For the foregoing reasons petitioners urge that a writ of certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit to the end that this case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals enforcing the order of the National Labor Relations Board be reversed.

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